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Supreme Court of the United States

OCTOBER TERM, 1940

No. 61

BEST & COMPANY, INC.,
Appellant,

vs.

A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT.

Opinions Below.

The original opinion delivered by the Supreme Court of the State of North Carolina is reported in 216 N. C. 114, 3 S. E. (2d) 292. Reargument was allowed, and on rehearing the said Court was evenly divided and two opinions were delivered, which are reported in 217 N. C. 134, 6 S. E. (2d) 893. No opinion was delivered in the Superior Court of Wake County, the court of first instance. (The judgment of that Court appears at R. 9.)

Jurisdiction.

The original judgment of the Court below was entered on June 16, 1939 (R. 19-20). Its judgment on rehearing was entered on February 2, 1940 (R. 47-48), and the original judgment thereupon became final for the purpose of appeal and review. The petition for appeal to this Court was filed and allowed on April 29, 1940 (R. 55-56).

Said final judgment is by the highest court of the State, in which a decision in the suit could be had; there was therein drawn in question the validity of the statute of the State of North Carolina hereinbelow referred to on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

The jurisdiction of this Court is invoked under Section 237(a) of the Judicial Code, as amended [28 U. S. C. §344(a)]. Probable jurisdiction was noted by this Court on June 3, 1940.

Statute Involved.

The particular subsection of the statute of the State of North Carolina, the validity of which is involved, is Section 121(e) of Chapter 127 of the State of North Carolina Public Laws of 1937, p. 208 [C. S. 7880 (51) (e)], which *verbatim* reads as follows:

> "Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars ($250.00), which license

shall entitle such person, firm, or corporation to display such samples, goods, wares, or merchandise in any county in this State."

The other pertinent provisions of the Article of the statute are set forth in the Appendix, at pp. 61-68, *infra*.

Statement of the Case.

Appellant, a New York corporation, is engaged in the retail apparel specialty store business in New York City, and it has no store or other place of business, officer or agent in North Carolina, and is not domesticated in that State (R. 7-8).

It brought the present suit in the Superior Court of Wake County, North Carolina, to recover the amount of tax collected from it by the appellee as Commissioner of Revenue of the State of North Carolina in purported compliance with the statute hereinabove set forth, and paid by it involuntarily and under protest on the ground that such statute was repugnant to the Commerce Clause and other provisions of the Constitution of the United States (R. 3-5, 8).

The case was tried on an agreed statement of facts (R. 7-9).

The Facts.

On February 9, 1938 appellant rented a room in the Robert E. Lee Hotel in Winston-Salem, North Carolina, where for a period of a few days it displayed samples of some of its merchandise to prospective customers, who were local residents invited by notices previously mailed from appellant's New York office. The articles on display were merely samples, which were exhibited to obtain orders for the retail sale of similar goods for future shipment in interstate commerce. No merchandise was sold or delivered

there, and none was offered or available for that purpose (R. 8).

The orders were taken subject to acceptance or rejection at appellant's office in New York, to which point all orders were forwarded. Those which were accepted were filled by shipment of the merchandise from New York direct to the customers by mail or through other regular channels of interstate commerce. The orders required and contemplated interstate deliveries for their fulfillment. No merchandise was sent to appellant's representative who conducted the display, and in no instance did he make, handle or aid the delivery thereof to the customer (R. 3-6, 8).

No payment or deposit on account of the purchase price was made or received at the time of the display. Invoices were sent from New York direct to the customers, who remitted payments to appellant's New York office (R. 4, 6, 8).

It is undisputed that the appellant's activities in North Carolina were directed solely to the solicitation of orders for the purchase of goods to be shipped interstate, and that in fact interstate sales only resulted therefrom (R. 8).

There is no issue as to the character of the merchandise, which was a legitimate subject of interstate commerce; and the tax does not purport to be exacted in the exercise of the police power of the State.[1]

Solely because appellant was not "a regular retail merchant in the State of North Carolina", the appellee demanded that it obtain the State license and pay the fixed-sum license tax of $250 prescribed by the statute here involved as a condition to and for the privilege of displaying its samples, which concededly was in furtherance of interstate sales (R. 8).

Section 181 of the law (Appendix, at p. 64) provides that it is unlawful to engage in any activities required to be licensed under the Article of the statute without first obtaining a license. Appellant therefore had no alternative but to pay the tax, which it did under written protest (R. 8).

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[1] Cf. *Brennan* v. *Titusville*, 153 U. S. 289, 298-299.

Appellee thereupon issued to appellant a "State Wide License", which expressly provides that it was for the privilege of "Displaying Merchandise" (R. 48A).

The appropriate procedure has been followed for compelling the return to appellant of the tax thus improperly demanded and collected (R. 8).

Appellee's answer admits that the sum thus demanded and paid was a license tax (R. 5).

The only issue raised by the pleadings, and the only issue involved in this suit, is whether the statute as applied to appellant is repugnant to the Constitution of the United States. This is exclusively a federal question.

The Proceedings Below.

On the trial of the action in the court of first instance only such federal questions were presented and judgment was rendered in appellant's favor (R. 9).

On appeal to the Supreme Court of the State of North Carolina the judgment was reversed, the Chief Justice dissenting (R. 11-20).

Appellant filed a petition to rehear and for correction of a statement contained in the original opinion as to the federal issues raised. The petition for rehearing was entertained and decided as follows:

> In so far as it sought to correct the statement contained in the original opinion with respect to the federal issues raised, it was unanimously allowed (with one Justice not participating);
>
> On the merits, the six participating Justices were evenly divided. The equal division was held to operate as an affirmance of the original opinion (R. 45-48).

Thus the final judgment was by an evenly divided court.

Inconsistencies in the Prevailing Opinion Below.

The displaying of samples by a drummer in a hotel room for the purpose of securing orders for the retail sale of goods to be shipped interstate into the taxing State was held to be "peculiarly a local and intrastate act, outside the realm of interstate commerce", and the tax as applied to appellant was therefore held not to infringe the Commerce Clause of the Federal Constitution.

This conclusion was reached despite the Court's recognition that appellant's activities in North Carolina were confined to the furtherance of interstate sales, as appears from the following excerpts from the prevailing opinion:

> "The use of North Carolina real estate for the purpose of displaying samples is commercially intended to result in interstate commerce" (216 N. C. 114, at p. 117);
>
> "Although such activity may be in the twilight zone of interstate commerce, it does not enter that enchanted realm. Although such displaying by sample may ultimately result in orders which will flow into interstate commerce, * * *" (*id.*, at p. 117);
>
> "It is a preliminary and incidental activity which, at the election of the seller, may or may not transpire prior to the beginning of the flow of events which constitute the movement of goods in interstate commerce" (*id.*, at p. 117);
>
> "The tax in no way hampers the movement of the samples, goods, etc., or of the merchandise sold, in interstate commerce" (*id.*, at p. 117).

Additionally, the reported statement preceding the Court's opinion contains the following pertinent sentence:

> "It is likewise agreed that just prior to 9 February, 1938, plaintiff rented for several days a display room in the Robert E. Lee Hotel, in Winston-Salem, and there displayed samples and secured retail orders for merchandise, later filled by shipment from the New York office, and that the tax here in dispute was levied upon this activity of the plaintiff."

In the attempt to distinguish the tax assessed against the appellant from those numerous fixed-sum privilege, license and occupation taxes on the business of soliciting orders for the purchase of goods to be shipped interstate, uniformly held unconstitutional by this Court [2], the prevailing opinion of the Court below labeled the tax a "use tax" for "the use of North Carolina real estate" (*id.*, at p. 117).

In applying this label the opinion disregarded the admissions contained in the pleadings, the plain and unambiguous provisions of the statute, the conflicting characterizations of the tax by the Court itself elsewhere in the same opinion, and the terms of the license issued to appellant upon payment of the tax, all of which were at direct variance with the "use tax" theory propounded. Cf. the following excerpts:

1. The answer:

> "Answering paragraph 3, this defendant says that as Commissioner of Revenue he demanded and collected from the plaintiff the sum of $250.00 due by it *as a license tax* levied under section 121(e) of Chapter 127 of the Public Laws of 1937, *which imposes a license tax* * * *" (R. 5).

2. Conflicting characterizations in the opinion:

> "The only question raised by this appeal: Is the State *tax upon the display of samples,* goods, etc., * * * invalid as violative of the Commerce Clause of the Constitution of the United States, Art. I, sec. 8(3)?" (*id.*, at p. 115);
>
> *"the commercial activity here taxed"* (*id.*, at p. 115);
>
> "Under this statute *the act* [3] *taxed* must occur in North Carolina, and the room where the act transpires must be within the State" (*id.*, at p. 116);

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[2] See cases cited in Point I, pp. 17-18, *infra.*

[3] The "act" is described a few lines earlier as follows: "the act, i. e., the display of samples, goods, etc.," (*id.*, at p. 116).

"Although *such displaying by sample* may ultimately result in orders which will flow into interstate commerce, * * *" (*id.*, at p. 117);

"*The displaying of samples in temporary quarters, here taxed*, was peculiarly a local and intrastate act, * * *" (*id.* at p. 118);

"It is a use tax, levied in the State of North Carolina *upon profitable and commercial activity*" (*id.*, at p. 116).

3. The statute:

The words "use tax" appear nowhere in the statute;

Article II (which contains the subsection here involved) is captioned "License Taxes";

"§100. Taxes under this article.—Taxes in this article or schedule shall be imposed as State *license tax for the privilege of carrying on the business, exercising the privilege, or doing the act named*, * * * * * * (c) The *State license* thus obtained shall be and constitute *a personal privilege to conduct the business* named in the State license, * * * and shall be construed to limit the person, firm, or corporation named in the license *to conducting the business and exercising the privilege named in the State license* to the county and/or city and location specified in the State license, * * * *";

§121, which contains subsection (e) here involved, is captioned "Peddlers." * * * "(e) Every person, firm, or corporation, * * * who shall display samples, goods, wares, or merchandise * * * shall apply for in advance and procure a *State license* * * * *for the privilege of displaying such samples*, goods, wares, or merchandise, and shall pay an *annual privilege tax* * * *, which license* shall entitle such person, firm, or corporation to display such samples, * * * * * * * (h) Counties, cities, or towns may levy *a license tax* on the business taxed under this section not in excess of the *annual license levied by the State.*";

"§181. Unlawful to operate without license.—When a *license tax* is required by law, * * * it shall be unlawful for any person, firm, or corporation without a-

license to engage in such business, trade, employment, profession, or do the act; * * * and no person, firm, or corporation shall be allowed the privilege of exercising any business, trade, employment, profession, or the doing of any act taxed in this schedule throughout the State under one license, except under a state-wide license."

4. The license:

"* * * license is hereby issued to engage in the business or practice the profession of * * * *Displaying Merchandise*" (R. 48A).

(Italics in foregoing quotations ours.)

It is clear from the foregoing excerpts that the license was required for and the tax imposed upon appellant's commercial activities, not its use of North Carolina real estate.

The glaring inconsistencies in the prevailing opinion are strikingly shown in the dissenting opinion on rehearing (concurred in by one-half of the Court), as follows:

> "The opinion heretofore filed in this case imputes to the statute a meaning not warranted by its terms. The construction is a forced one. * * * It [the statute] admits only of the interpretation that it is a tax on the privilege of taking orders for goods to be shipped in interstate commerce. The authorities are one in holding that such legislation is unconstitutional." (217 N. C. 134, 135-136.)

Related Decisions in Sister States Diametrically Opposed.

The decision below is squarely in conflict with the unanimous decisions rendered by the courts of last resort of the States of South Carolina and Louisiana, which expressly repudiate the decision of the Court below herein.

State v. *Yetter*, 192 S. C. 1, 5 S. E. (2d) 291;
State of Louisiana v. *Best & Company*, 194 La. 918, 195 So. 356; rehearing denied April 1, 1940.

The facts in each case are in all respects the same as herein. The appellant herein was the actual appellee in each. (Its employee Yetter was the nominal respondent in the South Carolina case.)

The statute construed was in each case identical in phraseology (as to all material particulars, even as to rate of tax) with the statute here involved.

The Supreme Court of each such State held the corresponding statute of its State to be invalid as repugnant to the Commerce Clause of the Constitution of the United States.

Both Courts refused to following the decision of the Court below herein, cited in the South Carolina decision and offered in argument by the Attorney General in the Louisiana case.

Neither decision was appealed to this Court; and the time within which to appeal has expired.

The decision of the Court below is unique and *sui generis*.

Importance of the Issue.

Discriminatory regulation of interstate commerce by State legislation aimed at its very inception is of the gravest public concern.

This Court has uniformly voiced its condemnation of fixed-sum license taxes imposed, as here, on the business of soliciting orders for the purchase of goods to be shipped interstate.

In flagrant disregard of the established precedents, the evenly divided Court below upheld the exaction on the ground that it was imposed on only a local act preceding the interstate transactions.

The challenged statute on its face purports to tax the display of samples in a hotel room or temporarily occupied house for the purpose of securing orders for the retail sale of similar goods. By a tenuous line of reasoning, which does violence to the language of the statute and to the un-

disputed facts, the Court below construed the statute as taxing "the display use of hotel rooms and temporarily rented property."

The statute excludes from its operation regular retail merchants in the State of North Carolina.

If the constitutionality of such discriminatory legislation is upheld, its far-reaching consequences may readily be foreseen. The legislatures of many of the other States, importuned by local merchants and others motivated by personal and purely selfish reasons, will with alacrity enact similar allegedly "protective" statutes and ordinances. That was precisely the situation a half century ago when this Court, cognizant of such trend, first vigorously condemned this type of legislation.[4]

Since March 13, 1937, the date of the enactment of the challenged North Carolina statute, similar legislation has already been placed on the statute books of several other States. In 1938 South Carolina and Louisiana passed statutes almost identical in phraseology with that here challenged, and the Supreme Court of each of such States unanimously held such legislation invalid as repugnant to the Commerce Clause of the Federal Constitution.[5]

This division in judicial opinion alone suffices to illustrate the great public importance of the issue presented, particularly as the Court below was equally divided, and the prevailing opinion cites no direct authority in support of its conclusion.

The nominal amount of tax sought to be recovered is manifestly no criterion of the gravity and moment of the issue presented. This suit was instituted as a test case. The statute not only levies a State annual privilege tax of $250., but it also authorizes counties, cities and towns to

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[4] An historical summary of the growth and extent of such attempted regulation of interstate commerce is contained in footnote 11 to the opinion of this Court in *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 56.

[5] *State* v. *Yetter, supra; State of Louisiana* v. *Best & Company, supra.*

levy a license tax, each in equal amount[6]; and many localities in the State have levied taxes pursuant to such enabling provisions. Since June 16, 1939, when the decision of the Court below was rendered, appellant has been obliged to pay, involuntarily and under protest, to the State of North Carolina and to its counties and cities the total sum of $4,975., as a condition to its conducting eighteen exhibits in the State, none of which lasted over three days. When one State alone can exact such tribute in so short a period of time, it is apparent that the total of the concerted exactions of the several States would, for all practical purposes, amount to an absolute prohibition on the solicitation of interstate sales.

Additionally it should be observed that, if the solicitation of orders by retailers in the manner set forth in the statute is constitutionally subject to State and local regulation by license and fixed-sum license taxation, then by the same token such regulation and taxation may, and undoubtedly will, be extended to the solicitation of orders in interstate commerce by others. There would be no compulsion to limit it to retailers; it could, and undoubtedly would, be applied to wholesalers and manufacturers as well. Each State would adopt the formula suited to its particular industrial or commercial circumstances. Thus States with large market centers would attempt to stifle competing interstate trade by wholesalers and manufacturers of other States.

The maintenance of a free national market, unobstructed by discriminatory State legislation, is indispensable to the economic well-being of the nation.[7] The throttling of in-

[6] §121(h), Appendix, at p. 64, *infra*.

[7] "This case again illustrates the wisdom of the Founders in placing interstate commerce under the protection of Congress. The present problem is not limited to Arkansas, but is of national moment. Maintenance of open channels of trade between the States was not only of paramount importance when our Constitution was framed; it remains today a complex problem calling for national vigilance and regulation."—Dissenting opinion in *McCarroll* v. *Dixie Lines*, 309 U. S. 176, 185.

terstate commerce by the setting up of discriminatory interstate barriers has consistently been recognized by this Court to infringe upon the Commerce Clause.

Specification of the Assigned Errors Intended to be Urged.

The Supreme Court of the State of North Carolina erred:

1. In refusing to hold that the provisions of the statute here involved are repugnant to Section 8 of Article I of the Constitution of the United States, in that:

(a) The said statute operates to place a tax or burden on interstate commerce which amounts to an unlawful regulation thereof, and to discriminate against such commerce in favor of intrastate commerce in the State of North Carolina;

(b) The tax thereby imposed and exacted from appellant is a tax or burden on interstate commerce which amounts to an unlawful regulation thereof, and, as applied to appellant, is a fixed-sum license or privilege tax on the business of soliciting orders for the purchase of goods to be shipped in interstate commerce, and constitutes a discrimination against such commerce and an unlawful obstruction of one of the essential and ordinary means and instrumentalities by which such commerce is legitimately carried on;

(c) If the tax thereby imposed and exacted from appellant is a use tax, as held by the Court below, it nevertheless constitutes a tax or burden on interstate commerce which amounts to an unlawful regulation thereof, and, as applied to appellant, constitutes a discrimination against such commerce and an unlawful obstruction of one of the essential and ordinary means and instrumentalities by which such commerce is legitimately carried on;

and in holding that the provisions of said statute are not repugnant to the said clause of the Federal Constitution (Nos. 1, 2; R. 51-52).

2. In refusing to hold that the provisions of the said statute denied to appellant the equal protection of the laws in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the said statute creates a whimsical, arbitrary, and capricious classification and imposes a tax or burden on the business transacted, sales made, and property situated without and not subject to the jurisdiction of the State of North Carolina, and in that its purpose, object and effect are to discriminate against appellant and others who are not regular retail merchants in the State of North Carolina and in favor of local or regular retail merchants of said State who are not subject to the said tax; and in holding that the provisions of the said statute do not deny to appellant the equal protection of the laws (Nos. 3, 4; R. 52-53).

3. In refusing to hold that the provisions of said statute deprive appellant of property without due process of law in contravention of Section 1 of said Fourteenth Amendment, in that the tax imposed by the said statute and exacted from appellant was on the business transacted and sales made by appellant and property of appellant situated without and not subject to the jurisdiction of the State of North Carolina; and in holding that the provisions of the said statute do not deprive appellant of property without due process of law (Nos. 5, 6; R. 53).

4. In reversing and in refusing to affirm the judgment rendered by the Superior Court of Wake County, and in rendering final judgment in favor of appellee and against appellant (No. 7; R. 53).

Summary of Argument

I

The statute, as applied to appellant, the license required thereunder, and the tax exacted from appellant, constitute an unlawful regulation of and burden upon and discriminate against interstate commerce, and they are therefore repugnant to the Commerce Clause of the Federal Constitution.

1. The fixed-sum license tax thereby imposed on appellant's occupation of soliciting orders for the purchase of goods to be shipped interstate into the taxing State is an interference with and prohibited burden upon commerce between the States.

2. The rule of *Robbins* v. *Shelby Taxing District* has been followed and approved by the most recent pronouncements of this Court.

3. Discrimination against interstate commerce, and not equality, is both the theme of the statute and its practical operation and effect when applied to appellant.

4. Appellant's activities in North Carolina were confined exclusively to soliciting orders for the sale of goods in another State which contemplated and necessarily required interstate shipment for their fulfillment. They constituted an integral part of interstate commerce, and not a local or intrastate act separable therefrom properly subject to taxation by North Carolina.

5. A State may not require a license as a condition precedent to the pursuing of activities in interstate commerce.

II

The characterization of the tax as a "use tax" by the Court below does not save it from constitutional offense.

1. The tax challenged is not a "use tax".
2. Even if the tax exacted is a use tax, it is nevertheless a discriminatory and prohibited exaction.
3. This Court is not bound by the form a statute bears or how it is characterized by the State Court. It should determine the true nature of the tax by ascertaining its operation and effect.

III

The authorities relied upon in the prevailing opinion of the Court below do not support the conclusion there reached and are inapplicable.

IV

The license required and the tax exacted from appellant deny it the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

The tax exacted from appellant deprives it of its property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

I

The statute, as applied to appellant, the license required thereunder, and the tax exacted from appellant, constitute an unlawful regulation of and burden upon and discriminate against interstate commerce, and they are therefore repugnant to the Commerce Clause of the Federal Constitution.

1. The fixed-sum license tax thereby imposed on appellant's occupation of soliciting orders for the purchase of goods to be shipped interstate into the taxing State is an interference with and prohibited burden upon commerce between the States.

The statute as applied to appellant fastens its grip directly and solely on interstate commerce by requiring a license and exacting a fixed-sum privilege tax for its transaction, which this Court has uniformly held to infringe the Commerce Clause.

Robbins v. *Shelby Taxing District*, 120 U. S. 489;
Corson v. *Maryland*, 120 U. S. 502;
Asher v. *Texas*, 128 U. S. 129;
Stoutenburgh v. *Hennick*, 129 U. S. 141;
Brennan v. *Titusville*, 153 U. S. 289;
Stockard v. *Morgan*, 185 U. S. 27;
Caldwell v. *North Carolina*, 187 U. S. 622;
Norfolk & West. Ry. Co. v. *Sims*, 191 U. S. 441;
Rearick v. *Pennsylvania*, 203 U. S. 507;
Dozier v. *Alabama*, 218 U. S. 124;
Crenshaw v. *Arkansas*, 227 U. S. 389;
Rogers v. *Arkansas*, 227 U. S. 401;
Stewart v. *Michigan*, 232 U. S. 665;
Davis v. *Virginia*, 236 U. S. 697;
Real Silk Mills v. *Portland*, 268 U. S. 325.

See also:

Welton v. *State of Missouri*, 91 U. S. 275;
Leloup v. *Port of Mobile*, 127 U. S. 640;
Lyng v. *Michigan*, 135 U. S. 161;
Crutcher v. *Kentucky*, 141 U. S. 47.

The law on this subject is so firmly entrenched that more than thirty years ago Mr. Justice Holmes considered it "established."[8]

The leading case[9] is *Robbins* v. *Shelby Taxing District*, *supra*, which involved the constitutionality of a Tennessee statute requiring drummers and persons not having a regular licensed house of business in the taxing district to pay a fixed-sum license tax for the privilege of offering for sale or selling goods by sample. Robbins, an Ohio resident, represented a Cincinnati firm and solicited in Memphis orders for the sale of goods to be shipped interstate, and exhibited samples for the purpose of effecting such sales.

This Court held that:

> "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce" (at p. 497),

and that a State cannot levy a tax upon and require a license from the citizens of other States for seeking to sell their goods in the State before they are introduced therein. Such a tax is a burden upon interstate commerce.

The Court took pains to point out the fundamental distinction between the right of a State to tax goods which have "become part of its general mass of property" after they have been brought into the State in consequence of an interstate sale, and the attempt to tax "the offer to sell them, before they are brought into the state", which

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[8] *Rearick* v. *Pennsylvania*, *supra*, at p. 510.

[9] So described in *Crenshaw* v. *Arkansas*, *supra*, at p. 395.

the Court holds "is a very different thing, and seems to us clearly a tax on interstate commerce itself" (at p. 497).

In reaching its conclusion the Court summarized the established principles on the meaning and effect of the Commerce Clause, and among the established doctrines set forth the following:

> "But in making such internal regulations a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; * * * and no discrimination can be made, by any such regulations, adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject." (at pp. 493-494).

The facts in *Brennan* v. *Titusville, supra,* are closely analogous to those in the case at bar. Brennan's employer, a manufacturer of picture frames and maker of portraits, was located in Chicago. Brennan solicited orders for pictures and frames in Pennsylvania and other States by going personally to residents and exhibiting samples. Upon receipt of the orders he forwarded them to Chicago, where they were filled by shipment direct to the purchasers by common carrier. The purchase price was collected generally by the carrier, but sometimes by the agent, and forwarded to Chicago. Brennan was convicted of violating a city license tax ordinance, one of the provisions of which required all persons canvassing or soliciting orders for goods within the city to procure a license and to pay a fixed-sum privilege tax therefor. The ordinance exempted persons selling by sample to manufacturers, licensed merchants and dealers. The Pennsylvania Supreme Court affirmed the conviction.

This Court held the ordinance invalid as repugnant to the Commerce Clause, and reaffirmed the principle that a manufacturer of goods which are legitimate subjects of

commerce may conduct an interstate business, through solicitation of orders in any State by itinerant road representatives, without being subjected to State or local privilege taxation.

The ordinance challenged in *Real Silk Mills* v. *Portland, supra,* required every person, going from place to place to take orders for goods for future delivery and receiving payment of any deposit of money in advance, to secure a license, file a bond, and pay a fixed-sum license fee. The appellant therein was an Illinois corporation engaged in manufacturing silk hosiery at Indianapolis. It employed representatives in several States to go from house to house soliciting and accepting orders. The representatives filled out and signed in duplicate an order blank for specified goods, which also provided for a deposit on each box of hosiery. It directed the mailing of the merchandise from the mills, via parcel post C.O.D., direct to the customer. The local salesman forwarded a copy of the order to the mill in Indianapolis, where the goods were packed and shipped to the purchaser. The solicitor retained the cash deposit as his commission.

This Court held that the ordinance materially burdened interstate commerce in contravention of the Commerce Clause, and that such burden was not lessened by the payment of compensation to the solicitor through the retention by him of the advance partial payments.

In none of the cases above analyzed and in few, if any, of the other cases above cited did the facts make out so strong a case against the validity of the statute challenged therein as in the instant case. The representative of the out-of-State merchant or manufacturer in such cases not only displayed samples and solicited orders, as in the case at bar, but additionally in many there were circumstances not here present, such as the maintenance of a permanent office in the State, the fact that the agent was a resident of the State, the assembly and delivery of the merchandise to the customer within the State by the agent after accept-

ance of the order at the home office, or the collection of all or part of the price, none of which were held by this Court to militate against the fundamental principle that the transactions constituted interstate commerce.

The instant case is not the first in which the Supreme Court of the State of North Carolina utterly disregarded the *Robbins* rule. At least twice before this Court has found it necessary to reverse the North Carolina Court on precisely the same issue.

Caldwell v. *North Carolina, supra;*
Norfolk & West. Ry. Co. v. Sims, supra.

In the *Caldwell* case there was challenged an ordinance of the City of Greensboro which imposed a fixed-sum license tax upon persons engaged in the business of selling or dealing in picture frames, pictures, etc. Caldwell, representing a Chicago concern, went to Greensboro for the purpose of delivering pictures and frames previously sold by other employees. The merchandise had been shipped to a railroad freight station addressed to the employer, from which station Caldwell took the packages to a hotel room, there broke bulk, placed some of the pictures in their frames, and delivered the pictures to the purchasers. This Court held that the ordinance was invalid when applied to an agent of a corporation from without the State, as an attempt to interfere with and regulate interstate commerce; and that the transaction was not deprived of its interstate character by the facts that the pictures and frames were not assembled before they were brought into the State, and that the articles were not shipped separately and directly to each individual purchaser.

It seems more than a coincidence that in the *Caldwell* case the North Carolina Supreme Court upheld the statute as imposing a tax on activity transpiring after the interstate transaction had been completed, whereas in the case at bar the tax is sought to be justified as affecting only preliminary and incidental activity transpiring before the interstate transaction is commenced.

In the *Caldwell* case such reasoning was rejected by this Court, which pointedly held (at pp. 632-633):

> "It cannot escape observation that efforts to control commerce of this kind, in the interest of the States where the purchasers reside, have been frequently made in the form of statutes and municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this court. The cases hereinbefore cited disclose the truth of this observation."

In the Attorney General's brief in the Court below in the instant case, he recognized that "the transaction taxed [in the *Caldwell* case] was undoubtedly one in interstate commerce."

The statute here challenged exacts from appellant a fixed-sum tax, therein designated as a "privilege tax," "for the privilege of displaying * * * samples, goods, wares or merchandise" "for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed"; and it further provides that the "license shall entitle such person * * * to display such samples."

Appellant, an extra-State merchant which had no place of business or agent in North Carolina, displayed samples of its merchandise for a few days in a hotel room in Winston-Salem for the purpose of obtaining orders for the retail sale of similar goods, which contemplated their shipment thereafter into the State through the channels of interstate commerce. Its activities in North Carolina were limited thereto. No merchandise was sold or delivered within the State and none was offered or available there for that purpose. The orders were all forwarded to, and were subject to acceptance at, appellant's New York office. Such orders as were accepted were filled by interstate shipment from New York direct to the customers in North Carolina. No part of the purchase price was collected at the time of the display and all remittances therefor were sent by the customers direct to appellant's New York office.

Appellant's activities in North Carolina constituted interstate commerce in its most basic form, as this Court held in *Crenshaw* v. *Arkansas, supra* (at p. 401):

> "Business of this character, as well settled by the decisions of this court, constitutes interstate commerce, and the privilege of doing it cannot be taxed by the State."

The Supreme Court of the State of Louisiana unanimously held a statute of that State which is substantially a counterpart of the statute here challenged to be unconstitutional and invalid on the theory of *Robbins* v. *Shelby Taxing District* and several of the other cases cited *supra*.

State of Louisiana v. *Best & Company, supra.*

The meaning and effect of the statute were succinctly set forth (at pp. 923-924) as follows:

> "The purpose of the law here under attack is to require all persons, firms, or corporations not being retail merchants in this state to pay a license tax for the privilege of displaying samples, models, goods, wares, or merchandise in a hotel, hotel room, or storehouse, or other place, when the purpose of making such display is to secure 'orders for the retail sale of such goods, wares or merchandise, or others of like kind or quality, either for immediate or future delivery'.
>
> The license tax is not imposed for the bare purpose of displaying samples of merchandise in a hotel room or other place, but for the privilege of so displaying such wares 'for the purpose of securing orders for the retail sale of such goods, wares or merchandise'."

And (at p. 927) that Court further held:

> "The act of exhibiting samples of goods to induce customers to take orders for the sale of merchandise is not separable from the other steps taken to consummate the interstate business. Each step is a part of one complete transaction."

Similarly, the Supreme Court of the State of South Carolina held the corresponding statute of its State repugnant to the Commerce Clause, on the ground that it imposed a fixed-sum license tax on the business of soliciting orders for the purchase of goods to be shipped interstate. In its decision it specifically stated that it was not in accord with the decision of the Court below herein, in view of the applicable decisions of this Court.

State v. *Yetter, supra.*

2. The rule of *Robbins* v. *Shelby Taxing District* has been followed and approved by the most recent pronouncements of this Court.

The prevailing opinion of the Court below cites no direct authority in support of the validity of the instant tax.[10]

It recognizes—yet fails to distinguish—the rule of the *Robbins* case.[11]

It relies largely, as it states, upon the recent trend of this Court to broaden the "state's taxing power over matters touching the fringe of the garment of interstate commerce" [12] and upon the adoption by this Court of "a new approach to the problem of state taxation as it relates to interstate commerce." [13]

In Point III, at pp. 50-56, *infra*, we have analyzed each of the authorities cited therein, all of which are inapplicable and relate to taxes or regulations of an entirely different kind from that here involved.

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[10] A fairly exhaustive examination of the law on this subject discloses no final adjudication of a State court contrary to appellant's contention. In our brief in the Court below there were cited over 200 State court decisions in 43 States, some of which appear in the appendix to the petition for rehearing (R. 31-35).

[11] It is noteworthy that the Attorney General conceded, in the court of first instance, that the *Robbins* case and others to like effect were in point and controlling, unless modified or overruled by later opinions of this Court.

[12] 216 N. C. 114, 118.

[13] *Id.*, at p. 120.

In its opinion the Court below aptly uses the expression, "a casual reading of many of the recent pronouncements of the Supreme Court of the United States". Such reading must have been most casual indeed, because a more careful study would have shown, beyond peradventure of a doubt, that the rule of the *Robbins* case has been uniformly recognized in each of this Court's most recent pronouncements.

McGoldrick v. *Berwind-White Co.*, 309 U. S. 33, 55-56[14];

Southern Pacific Co. v. *Gallagher*, 306 U. S. 167, 174;

Gwin, etc., Inc. v. *Henneford*, 305 U. S. 434, 437, 441;

South Carolina Highway Dept. v. *Barnwell Bros.*, 303 U. S. 177, 185, 186;

Cooney v. *Mountain States Tel. Co.*, 294 U. S. 384, 392;

Minnesota v. *Blasius*, 290 U. S. 1, 9;

Helson & Randolph v. *Kentucky*, 279 U. S. 245, 250;

Texas Transp. Co. v. *New Orleans*, 264 U. S. 150, 152, 154 (see also dissenting opinion by Justices Brandeis and Holmes, which (at p. 157) cites the *Robbins* case as authority for the proposition that a tax may not be laid upon "a drummer or delivery agent * * * engaged exclusively in inaugurating or completing his own or his employer's transaction in interstate commerce").

That there is no conflict between the *Robbins* case and the cases relied upon by the Court below is clearly illustrated by the decision in *Southern Pacific Co.* v. *Gallagher*, *supra*, in which both lines of authority are cited with approval for the respective rules of law for which they properly stand. Mr. Justice Reed therein made a very careful analysis of both and, as to the first, states (at p. 174):

"The first makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on,

[14] The *McGoldrick* decision was rendered after the decision of the Court below.

> interstate commerce is invalid. * * * A license tax on sales by samples burdens one selling only goods from other states." (Citing in footnote *Robbins* v. *Shelby Taxing Dist., supra,* and *Brennan* v. *Titusville, supra.*)

The crux of the entire problem of State taxation as it relates to interstate commerce is succinctly set forth in that opinion (at pp. 177-178) as follows:

> "The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress."

What the Court below failed to recognize is that the incidence of the statute here involved is cast, not upon a separate taxable event in the State, but directly upon appellant's solicitation of orders for merchandise prior to their introduction into the State through the channels of interstate commerce which, as held in *Helson & Randolph* v. *Kentucky, supra,* at p. 250, the State is without power to tax.

The latest expression of this Court's condemnation of fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate is contained in the opinion in *McGoldrick* v. *Berwind-White Co., supra.* Mr. Justice Stone sets forth therein the background of the rule in the *Robbins* case and the reasons for its adoption, and he characterizes the fundamen-

tal vice of statutes such as that here challenged (at p. 46, footnote 2) as follows:

> "Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state."

And again (at pp. 55-57) this Court holds:

> "It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, which have held invalid, license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. See *Robbins* v. *Shelby County Taxing District*, *supra*, 498; *Caldwell* v. *North Carolina*, 187 U. S. 622, 632. * * * It is enough for present purposes that the rule of *Robbins* v. *Shelby County Taxing District*, *supra*, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate."

As we read the latest decisions of this Court they indicate clearly and unmistakably that the rule of the *Robbins* case is controlling and determinative herein.

3. Discrimination against interstate commerce, and not equality, is both the theme of the statute and its practical operation and effect when applied to appellant.

The statute here challenged, although not expressly so phrased, was designed to discriminate against the solicitation by extra-State merchants of orders for the sale of

goods without the State necessarily requiring shipment into the State across State lines. The displaying of samples, specifically licensed and taxed, is but incidental to such solicitation.

In application that is in fact the result. The following analysis makes that clear:

> By its terms the statute applies to persons "who shall display samples * * * for the purpose of securing orders for the retail sale of such goods * * * so displayed," **and it expressly excludes all regular retail merchants in the State of North Carolina.**
>
> All residents are thereby excluded, because, by engaging in the taxed activity, they necessarily are regular retail merchants in the State. Out-of-State merchants who sell from stock on hand within the State are also excluded, because they thereby fall within the category of regular retail merchants in the State.
>
> It therefore applies, and can apply, **only** to out-of-State retail merchants soliciting orders within the State to be consummated by later interstate shipment.

The license required and the tax imposed thereunder are "aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales."

McGoldrick v. *Berwind-White Co., supra,* at p. 55.

Their raison d'être is thus expressed in *Robbins* v. *Shelby Taxing District, supra* (at p. 498):

> "It would not be difficult, however, to show that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular li-

censed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it."

The animus of the Act was described by the South Carolina Court in *State* v. *Yetter, supra* (at p. 5) as follows:

"It is true that the defendant's principal does not have to come into this State to transact business and the clear intent of this Act is to discourage, to say the least, his doing so; * * *"

The Court below took the position that the tax was designed "to remove a discrimination previously existing against regular, taxed, retail merchants" (at p. 116), and to impose tax upon the commercial activity of appellant which "has heretofore escaped taxation in the State" (at p. 120). The appellee contends similarly and argues that regular retail merchants in the State are taxed under

Section 405 [15], Chapter 127 of the Public Laws of 1937, and are subject to other taxes, whereas "one not a regular retail merchant in North Carolina but engaging in merchandising by securing orders for the retail sale of goods, wares, or merchandise is subject only to the tax imposed by the statute under question."

That there is absolutely no warrant for that position is manifest from a careful examination of the applicable North Carolina statutes.

In the first place, regular retail merchants in the State of North Carolina are not required to apply for a license or to pay a privilege tax, in a fixed sum or otherwise, for the privilege either of displaying samples or of selling their merchandise within the State, whether such business is conducted in a hotel room, a rented house, a store or elsewhere. That is clear from an examination of Article II of the statute, which is captioned "License Taxes," and which is the only statute of the State imposing or authorizing the imposition of license taxes. Nowhere in that Article is there any provision whatsoever imposing a license tax on such regular retail merchants in the State. They are specifically excluded from the application of the subsection of that Article here involved.

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[15] In his Statement Opposing Jurisdiction (at p. 5) the Attorney General argues inferentially that the tax under Section 405 is imposed only on regular retail merchants in the State, and in support of his contention he refers to the definition of the term "retail merchant" contained in Section 404. Those sections are part of Article V, the "Sales Tax Article" of the statute, and their application is limited to "the purposes of this article." The definition of the term "retail merchant" for the purposes of the Sales Tax Article has no bearing whatsoever upon the meaning of the words "regular retail merchant in the State of North Carolina" used in the subsection of the License Tax Article here involved. If appellant should effect intrastate sales at its exhibits and make intrastate deliveries, it would be subject to the provisions of the Sales Tax Article even though, for the purposes of the tax here involved, it should not be considered as a "regular retail merchant in the State of North Carolina."

In the second place, regular retail merchants in the State of North Carolina are not actually taxed under Section 405. The sales tax is in effect a tax upon the sale and not upon the retail merchant. It is to be paid by the consumer.[16] Moreover, the State of North Carolina has enacted a "compensation use tax"[17] at the same rate as the sales tax on the storage, use or consumption in the State of tangible personal property purchased from a retailer within or without the State for such storage, use or consumption; and under Section 806 an extra-State retailer may be authorized to collect and pay such tax; so that, in any event, the State will collect the tax on the sale.

In the third place, appellant and other extra-State merchants would, if they had samples or other property in the State on the assessment date, be subject to property tax just as is a regular retail merchant in the State of North Carolina, irrespective of whether or not such property was there solely for the purpose of soliciting sales in interstate commerce.[18]

Finally, appellant and other extra-State merchants are subject to the fixed-sum license tax here involved and, if an intrastate sale is effected and merchandise is delivered from the stock on display, they may also be subject to each and every other type of tax payable by any retail merchant in North Carolina, namely:

Sales tax—required by law to be passed on to the consumer;

Property tax—if the property is on hand on the assessment date;

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[16] Section 401 expressly provides that "it is the purpose and intent of this article that the tax levied herein on retail sales shall be added to the sales price of merchandise and thereby be passed on to the consumer instead of being absorbed by the merchant"; and it prohibits under penalty of a misdemeanor the advertising by any retail merchant of an offer to absorb the tax, or that the tax is not considered as an element in the price to the consumer.

[17] Art. IX of Ch. 158, P. L. 1939.

[18] See §186 of the statute, Appendix, at p. 65, *infra*.

Income tax[19]—payable in any event on net income earned within the State, e. g., net rents from real property owned there;

Corporate entrance fees[20] and annual franchise tax[21]—which the State could and undoubtedly would demand if intrastate business were thus carried on and if, as is the case with appellant, a corporate entity is involved.

It must be borne in mind that appellant is in any event subject to the same or similar taxes in the State of New York, under the laws of which it was organized and where it has its principal place of business.

The argument that the intent of the statute is to equalize and not to discriminate is therefore a snare and a delusion. As above shown, if appellant actually made some sales at its displays in North Carolina (instead of merely exhibiting samples), it would be doing business in North Carolina and therefore subject to all taxes payable by local merchants. And *additionally* it might be obliged to pay the license tax here involved if it were still deemed not to be "a regular retail merchant in the State of North Carolina."

Revenue may be the excuse; discrimination is the essence.

The statute not only imposes a State license tax of $250., but it also authorizes counties, cities and towns each to impose a license tax in like sum.

> "So, too, what the State may do directly it may authorize its municipalities to do, and if, under legislative sanction, each of the large towns in the State of North Carolina saw fit to adopt a similar license tax, the consequence would be, not a simple interference with interstate commerce, but a practical destruction of one important branch of it."
>
> *Norfolk & West. Ry. Co.* v. *Sims, supra,* at pp. 446-447.

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[19] Art. IV of Ch. 127, P. L. 1937.

[20] North Carolina Code of 1935, as amended, §1181.

[21] Art. III of Ch. 127, P. L. 1937.

That is precisely the situation here. There has been exacted from appellant not merely the State privilege tax of $250., but also a like sum by each county and a like sum by each city in the State in which it has conducted its exhibits. The aggregate of the taxes thus paid by appellant since the decision below was rendered (June 16, 1939) has reached the staggeringly burdensome sum of $4,975.

The taxing Act in the *Robbins* case did not on its face discriminate against out-of-State sellers. The decision stands for the proposition that the court will look beyond the face of the Act in order to determine whether the tax will place interstate commerce at a competitive disadvantage.

Our argument may best be phrased in the language of Mr. Justice Stone in *McGoldrick* v. *Berwind-White Co.*, *supra* (at p. 48):

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

And again in *Gwin, etc., Inc.* v. *Henneford, supra* (at p. 438):

> "But it is enough for present purposes that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce * * *."

In *South Carolina Highway Dept.* v. *Barnwell Bros., supra,* the Court held (at pp. 185-186):

> "The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, 498; *Caldwell* v. *North Carolina,* 187 U. S. 622, 626. It was to end these practices that the commerce clause was adopted. (Citing cases.)"

To the same effect see:

Southern Pacific Co. v. *Gallagher, supra,* at p. 178.

A fixed-sum tax, substantial in amount, upon temporary displays in hotel rooms normally used for very limited periods of time, which is based upon neither the value of the merchandise displayed nor the volume of business done and is exacted only from others than "regular retail merchants in the State," is a disingenuous and flagrant means of discriminating against competitive interstate commerce with the view to its suppression.

4. Appellant's activities in North Carolina were confined exclusively to soliciting orders for the sale of goods in another State which contemplated and necessarily required interstate shipment for their fulfillment. They constituted an integral part of interstate commerce, and not a local or intrastate act separable therefrom properly subject to taxation by North Carolina.

Solicitation of orders for interstate sales is part of the commerce itself. It is not preliminary to or separable from such commerce. It does not constitute engaging in intrastate business.

Robbins v. *Shelby Taxing District, supra,* at p. 497;
Brennan v. *Titusville, supra,* at p. 298;
Sonneborn Bros. v. *Cureton,* 262 U. S. 506, 515.

The license is required and tax is imposed by the statute, not on the displaying of samples *per se,* but on the privilege of so displaying such samples "for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed."

It is conceded that the orders solicited by appellant were solely for interstate sales. The displaying of the samples was but the first step taken in furtherance thereof; it was but a means of exhibiting to prospective customers the kind and quality of appellant's goods to induce them to give orders therefor; it was as indispensable to the consummation of the interstate transaction as was the transportation of the merchandise across State lines.

This was the conclusion of the courts of co-ordinate jurisdiction in the related cases in two sister States.

State of Louisiana v. *Best & Co., supra,* at p. 927;
State v. *Yetter, supra.*

In the latter case the Court held (at p. 5):

> "Each element of the definition of interstate commerce is present in this transaction and as I view it, each step is a necessary link in the chain. * * * Each act done by this defendant was a related and necessary step in the consummation of a transaction in interstate commerce."

The Court below reaches the remarkable conclusion that "the display use of hotel rooms and temporarily rented property here taxed is not a usual, necessary, or essential part of a commercial, retail business," and that "it is a preliminary and incidental activity which * * * may or may not transpire prior to the beginning of the flow of events which constitute the movement of goods in interstate commerce" (at p. 117).

Compare the admonition of this Court in *Brennan* v. *Titusville, supra* (at p. 298):

> "It is true, also, that the tax imposed is for selling in a particular manner, *but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling-house, is surely a regulation of commerce.*" (Italics ours.)

This is of the essence.

Under the rule in the *Brennan* case above quoted, the challenged statute must fall. The tenuous distinction drawn by the Court below does not remove from it the stamp of unconstitutionality. Whether the statute seeks to regulate merely the displaying of samples, or whether it seeks to regulate the display use of hotel rooms and temporarily rented or occupied houses, as it is construed by the Court below, is immaterial. In either event, as conceded by the Court, there must be present "the purpose of securing orders for retail sale of goods, etc." (at p. 116). Both are condemned by the holding above set forth.

This Court has repeatedly held that soliciting orders for the purpose of negotiating interstate sales is not local activity, whether carried on by house to house canvassing, or in a store, office or house.[22]

The statute here involved covers displays in homes, and additionally in hotel rooms. The difference is in detail and not in substance; it does not convert the activity into a local one. (See *State of Louisiana* v. *Best & Co., supra*, at p. 925.)

The Court below failed to recognize the basic rule that interstate commerce embraces more than an interstate shipment. It holds that "the tax in no way hampers the

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[22] *Stockard* v. *Morgan, supra* (office); *Rearick* v. *Pennsylvania, supra* (house to house canvassing); *Crutcher* v. *Kentucky, supra* (store); *Crenshaw* v. *Arkansas, supra* (house to house canvassing, under a division superintendent located in the State); *Davis* v. *Virginia, supra* (house to house canvassing); *Real Silk Mills* v. *Portland, supra* (house to house canvassing).

movement of the samples, goods, etc., or of the merchandise sold, in interstate commerce" (at p. 117).

The prohibition against the imposition of burdens upon interstate commerce extends to the means and instrumentalities by which such commerce is carried on.

That principle has time and again been recognized by this Court in cases involving all types and forms of attempted State regulation and taxation, e. g.:

Privilege taxes measured by gross receipts:

Gwin, etc., Inc. v. *Henneford, supra,* at p. 437;
Puget Sound Co. v. *Tax Commission,* 302 U. S. 90;
Crew Levick Co. v. *Pennsylvania,* 245 U. S. 292, 295-296;

State franchise and excise taxes measured by an apportioned percentage of capital stock or corporate excess:

Cheney Brothers Co. v. *Massachusetts,* 246 U. S. 147, 153;
Alpha Cement Co. v. *Massachusetts,* 268 U. S. 203, 217, 218;
Ozark Pipe Line v. *Monier,* 266 U. S. 555, 562-563, 565;

Requiring a foreign corporation to qualify or file statements or denying to it the right to sue:

International Text Book Co. v. *Pigg,* 217 U. S. 91, 107, 112;
Dahnke-Walker Co. v. *Bondurant,* 257 U. S. 282, 290-291;
Furst v. *Brewster,* 282 U. S. 493, 497, 498;

Sales tax when applied to gasoline consumed in interstate transportation:

Helson & Randolph v. *Kentucky, supra,* at p. 250;

Fixed-sum license taxes on railroad and steamship agencies engaged solely in soliciting or aiding interstate or foreign traffic:

McCall v. *California*, 136 U. S. 104, 111;
Texas Transportation & Terminal Co. v. *New Orleans*, *supra*, at pp. 156-157;

Fixed-sum license taxes of the type involved in the case at bar:

See cases cited at pp. 17-18, *supra*.

See also:

Gibbons v. *Ogden*, 9 Wheat. 1, 189-196;
Swift & Co. v. *United States*, 196 U. S. 375, 398, 399;
Heyman v. *Hays*, 236 U. S. 178, 184, 185-186;
Weeks v. *United States*, 245 U. S. 618;
Stafford v. *Wallace*, 258 U. S. 495, 518;
Binderup v. *Pathe Exchange*, 263 U. S. 291, 309;
Federal Trade Commission v. *Pacific Paper Assoc.*, 273 U. S. 52, 64;
Foster Packing Co. v. *Haydel*, 278 U. S. 1, 10.

In the *Gwin* case, *supra*, the question was whether interstate commerce was burdened by a Washington tax, measured by the gross receipts of the appellant therein from its business of marketing fruit shipped from Washington to the places of sale in various States and in foreign countries. The Supreme Court of Washington held that the shipment of fruit from the State of origin to points outside and its sale there involved interstate commerce, but that the activities in Washington in promoting the commerce were a local business subject to State taxation. In reversing this contention this Court held (at p. 437):

"We need not stop to consider which, if any, of appellant's activities in carrying on its business are in themselves transportation of the fruit in interstate

or foreign commerce. For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that commerce. Such services are within the protection of the commerce clause, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Real Silk Mills* v. *Portland*, 268 U. S. 325; * * *."

The principal cases relied upon by appellant are cited with approval in *Delamater* v. *South Dakota*, 205 U. S. 93, a case which involved the constitutionality of a South Dakota statute imposing a license tax on traveling liquor salesmen, which was enacted pursuant to the provisions of a federal statute, known as the Wilson Act. The latter statute granted to the States the power to regulate interstate commerce in intoxicating liquors. Although this Court sustained the validity of the South Dakota law solely because of the provisions of the Wilson Act, the following dictum from the opinion is noteworthy:

> "Of course if the owner of the liquor in another State had a right to ship the same into South Dakota as an article of interstate commerce, and, as such, there sell the same in the original packages, irrespective of the laws of South Dakota, it would follow that the right to carry on the business of soliciting in South Dakota was an incident to the right to ship and sell, which could not be burdened without directly affecting interstate commerce." (at pp. 100-101).

Obviously a fixed-sum State privilege tax, especially when multiplied by a number of county and city exactions in like amount, serves to prohibit the extra-State merchant from utilizing his most effective method of obtaining a market. To carry on interstate commerce is not a franchise or privilege granted by the State, which has not the right either to dictate to the extra-State merchant the manner in which he may solicit orders for interstate sales, or to require him to forego a legitimate method of transacting his business. Where, as here, police power is not involved,

it is a right to which he is entitled, subject only to regulation by the Congress.

Crutcher v. *Kentucky, supra,* at p. 57;
International Text Book Co. v. *Pigg, supra,* at pp. 109-110;
Oklahoma v. *Kansas Nat. Gas Co.,* 221 U. S. 229, 260.

The fine-spun distinctions by which the Court below seeks to split appellant's activities into two parts, each independent of the other, one local and one interstate, is directly at variance with the basic concept of interstate commerce. In the language of Mr. Justice Holmes: "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."[23] "What is commerce among the States is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed. * * * The offer was a part of the interstate bargain * * *"[24]; "* * * the furnishing of the opportunity was a part of the interstate transaction. From the point of view of commerce the business was one affair."[25]

5. A State may not require a license as a condition precedent to the pursuing of activities in interstate commerce.

People v. *Horton Motor Lines,* 281 N. Y. 196.

The defendant in that case, a North Carolina corporation, was an interstate motor carrier. In the course of its operations it employed two kinds of motor trucks, the tractor-trailer type used for long hauls between fixed termini, and smaller trucks to ply between its terminal in New York City and the customer's door to pick up or

[23] *Swift & Company* v. *United States, supra,* at p. 398.
[24] *Dozier* v. *Alabama, supra,* at p. 128.
[25] *Davis* v. *Virginia, supra,* at p. 699.

deliver the freight. The large trucks traveled over "regular routes," while the smaller vehicles were used for "irregular routes." The smaller trucks were also employed between the terminal and other carriers to transfer freight passing through New York City. The defendant was convicted in the court of first instance of violating the New York City Public Cart Ordinance, which required public cartmen to take out a license and to pay a fee therefor. The conviction was based upon a pick-up and delivery service rendered by one of the smaller trucks on the "irregular route," which the intermediate appellate court held to precede or to follow the interstate shipment, and to be separate and distinct therefrom.

It is interesting to note in passing that not only was the reasoning of the intermediate appellate court apposite to the reasoning of the Court below herein, but also that there was involved in that case a New York ordinance sought to be applied to a North Carolina corporation, whereas in the case at bar a North Carolina license statute is sought to be applied to a New York corporation.

The New York Court of Appeals reversed the conviction and held (at pp. 203-204) as follows:

> "It is clear that whatever may be the limits of a State's power to tax property or activities related to interstate commerce, the State may not require a license as a condition precedent to the pursuing of activities in interstate commerce. (Citations.) The ordinance in question is not a tax measure, but is a comprehensive scheme to license the calling of public cartmen. Even if the ordinance were designed solely as a revenue measure, it is doubtful whether it could apply to defendant's smaller trucks. (Citation.)
>
> The ordinance in the case at bar is not one of the types of taxation or police regulation by the states or municipalities which are permitted under principles well defined. It is not in the nature of a property tax (citation); nor is it regulation which involves a proper exercise of the police power (citation); nor is it a regulation of an intrastate activity, which may be separable from interstate commerce. • • •

> The ordinance in the case at bar does not levy a tax upon an intrastate activity closely related to interstate commerce, but attempts to tax an integral portion of interstate commerce itself."

The rationale of the New York Court is in striking contrast with the unorthodox approach to the problem by the Court below which, in an effort to sustain the validity of the statute, found it necessary to construe the Commerce Clause of the Federal Constitution *de novo* and without regard to its well-rooted historic background.

We submit that the Commerce Clause, by its own force, prohibits discriminatory regulation of interstate commerce, whatever may be its form or method, and that the challenged statute is a transparent attempt at such regulation.

II

The characterization of the tax as a "use tax" by the Court below does not save it from constitutional offense.

1. The tax challenged is not a "use tax".

In the attempt to save the statute from repugnancy to the Commerce Clause of the Federal Constitution, the prevailing opinion of the Court below advances the theory that the tax thereby levied is a "use tax" imposed "upon the use of North Carolina real estate" (at p. 117).

With this view three of the six participating Justices vigorously dissent on rehearing, and they condemn such forced construction as imputing to the statute a meaning not warranted by its terms, which cannot save it from constitutional offense.

In considering the corresponding and virtually identical Louisiana statute, the Supreme Court of that State likewise finds "no merit" whatsoever in the suggestion that the tax "partakes of the nature of a use tax."[26]

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[26] *State of Louisiana* v. *Best & Company, supra,* at p. 934.

A mere reading of the statute (Appendix, at pp. 61-68, *supra*) demonstrates the fallacy of the "use tax" theory. At pp. 7-9, *supra*, there is set forth an analysis of the inconsistencies in the prevailing opinion of the Court below with particular reference to such "use tax" theory, in which material excerpts from the statute are quoted in refutation thereof.

Suffice it to say here that:

The statute nowhere employs the words "use tax", or any words of similar import;

Contrariwise, the Article of the statute is captioned "License Taxes", and the taxes imposed by its several provisions, including the subsection here involved, all are specifically denominated license taxes;

The particular subsection here challenged unequivocally shows on its face that the license tax thereby imposed is "for the privilege of displaying * * * samples, goods, wares, or merchandise" "for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed"; and, in practical operation when applied to appellant, it affects, and can affect, only the transaction of interstate commerce;

That particular subsection is a part of a section captioned "Peddlers", each of the several subdivisions of which imposes a license or privilege tax on a particular type of peddler or drummer. (Cf. *Caldwell* v. *North Carolina, supra.*)

Upon the principle of *noscitur a sociis* all parts of the same section—and additionally all parts of the same Article—must be read together. The particular tax here challenged may not be isolated from the others and otherwise denominated. They together form an integrated taxing unit, imposing fixed-sum license taxes, which does not harmonize with the theory that the incidence of the tax

here challenged is on "the use of North Carolina real estate." Such interpretation is obviously inconsistent and at direct variance with the legislative intent.

The State of North Carolina now has a law imposing a true use tax within the correct and accepted meaning of that expression as defined by judicial decisions. It is known as the Compensation Use Tax Article.[27] It is in no respect similar to the statute here involved. It levies and imposes an excise tax on the storage, use or consumption in the State of tangible personal property purchased from a retailer within or without the State for storage, use or consumption in the State, at a rate equal in amount to the rate of tax under the sales tax law. The word "use" is therein defined to mean and include "the exercise of any right or power over tangible personal property incident to the ownership of that property."

A "use tax" is predicated upon the ownership of the property as in the Compensation Use Tax Law, and not on the temporary occupancy of a local hotel room, as contended by the Court below in construing the challenged statute.

It is a property tax upon the privilege of use, which is one of the attributes of ownership.

Henneford v. *Silas Mason Co.*, 300 U. S. 577.

Mr. Justice Cardozo, in speaking for this Court in that case, said (at p. 582):

> "The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.
>
> Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. (Citations.) * * * The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership."

[27] Art. IX of Ch. 158, P. L. 1939.

At p. 586, he points out the very distinction here pertinent, viz.:

> "But a tax upon use, or, what is equivalent for present purposes, a tax upon property after importation is over, is not a clog upon the process of importation at all * * *."

The *Henneford* decision cautions against the very thing done by the Court below in using the self-evident misnomer "use tax" in connection with the tax here involved:

> "Catch words and labels * * * are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard." (at p. 586.)

The decision in *Southern Pacific Co.* v. *Gallagher, supra,* which is the latest expression of this Court on the subject of use taxes, demonstrates that there is no conflict whatever between the recent decisions on that subject and the principal authorities relied upon by appellant herein, in which fixed-sum license taxes imposed upon the privilege of soliciting orders for the purchase of goods to be shipped interstate have been held repugnant to the Commerce Clause. It cites with approval the precedents on the latter subject.[28]

As we read *Robbins* v. *Shelby Taxing District, supra,* it appears to us to be the forerunner and historical precedent—if not the grandfather—of the recent use tax decisions (note the significant language therein, at p. 497 [29]).

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[28] See pp. 25-26, *supra.*

[29] "As soon as the goods are in the state and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, * * *. When goods are sent from one state to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them *as* goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. (Citations.) But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself."

In the case at bar no property tax whatsoever is involved. The display use of samples, which concededly did not become part of the common mass of property within the State, was, in the language of Mr. Justice Cardozo, "so closely connected with delivery as to be in substance a part thereof." [30]

The instant tax is not and cannot properly be characterized as a "use tax", since it is a tax upon the interstate commerce itself, to wit, upon the privilege of soliciting orders, rather than upon the privilege of use.[31]

2. Even if the tax exacted is a use tax, it is nevertheless a discriminatory and prohibited exaction.

The dissenting opinion of the Court below on rehearing pithily states our argument as follows:

> "Nor can the construction heretofore given to the statute save it from constitutional offense. If the tax imposed be a 'use tax', it is discriminatory." (217 N. C. 134, 136.)

The gist of the decision in *Henneford* v. *Silas Mason Co.*, *supra*, is that "the tax upon the use after the property is at rest is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them."

In the case at bar the very purpose of the tax is to hamper transactions of interstate commerce and discriminate against them. The point of time when the immunity from State taxation ceases has not been reached while a merchant is still actively engaged in soliciting orders for the sale of goods to be shipped interstate.

Cf. *Brown* v. *Maryland*, 12 Wheat. 419, 441.

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[30] See 300 U. S., at p. 583.

[31] Cf. following excerpt from the opinion of the Court below: "It is a use tax, levied in the State of North Carolina upon profitable and commercial activity which has otherwise escaped taxation * * *" (at p. 116).

The tax is concededly not imposed on any use of the hotel room other than the display use thereof for the sole purpose of securing orders for the retail sale of goods. If a discriminatory burden were not intended, the purpose of the use of such property would be entirely immaterial, and the use thereof by regular retail merchants in the State of North Carolina would not be exempted. If the tax were a true use tax, it would not be in a fixed sum, imposed without relation to the amount or value of the property used, the duration of the period of use, or the number of rooms or parcels of property used.

Limited as it is in practical operation to extra-State merchants temporarily using hotel rooms and rented houses for the display of samples for the sole purpose of securing orders for the sale of goods to be shipped interstate, the tax is a discriminatory and prohibited exaction (see Point I, subdiv. 3, *supra*), no matter how it may be characterized by the Court below.

3. This Court is not bound by the form a statute bears or how it is characterized by the State Court. It should determine the true nature of the tax by ascertaining its operation and effect.

In his Statement Opposing Jurisdiction, the Attorney General significantly sought to avoid a consideration of the appeal on its merits by invoking the familiar rule (here inapplicable) that the construction placed upon a State statute by the highest Court of the State is binding upon this Court.

In so doing, he ignored the equally familiar rule that this Court must determine the questions raised under the Federal Constitution upon its own judgment of the actual operation and effect of the tax, irrespective of the label it bears or the manner in which it is construed by the State court.

Galveston, Harrisburg &c. Ry. Co. v. *Texas,* 210 U. S. 217, 227;

Kansas City Ry. v. *Kansas*, 240 U. S. 227, 231;
Crew Levick Co. v. *Pennsylvania, supra*, at p. 294;
International Paper Co. v. *Massachusetts*, 246 U. S. 135, 142;
Air-Way Corp. v. *Day*, 266 U. S. 71, 82;
Carpenter v. *Shaw*, 280 U. S. 363, 367;
Near v. *Minnesota*, 283 U. S. 697 708;
Nashville, C. & St. L. Ry. v. *Wallace*, 288 U. S. 249, 259;
Schuylkill Trust Co. v. *Penna.*, 296 U. S. 113, 119.

This Court has specifically held to that effect in two prior cases carried up from the Supreme Court of the State of North Carolina, which, as in the case at bar, involved fixed-sum license taxes.

Caldwell v. *North Carolina, supra*, at p. 624;
Norfolk & West. Ry. Co. v. *Sims, supra*, at p. 447.

In the latter case the Court said:

"* * * it is evident that the state courts could not give it a construction which would operate as an interference with interstate commerce, and that upon this question the opinion of this court is controlling."

Similar rulings of this Court have been made in other cases relating to fixed-sum license tax statutes, e. g.:

"The mere calling the business of a drummer a privilege cannot make it so."

Robbins v. *Shelby Taxing District, supra*, at p. 496.

"Even if those declarations had been the reverse, and the license in terms been declared to be exacted as a police regulation, that would not conclude this question, for whatever may be the reason given to justify, or the power invoked to sustain the act of the State, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government, it cannot be sustained."

Brennan v. *Titusville, supra*, at p. 299.

"The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon interstate commerce."

Stockard v. *Morgan, supra,* at p. 36.

"We must look, however, to the substance of things, not the names by which they are labelled, particularly in dealing with rights created and conserved by the Federal Constitution and finding their ultimate protection in the decisions of this court."

Crenshaw v. *Arkansas, supra,* at p. 400.

The Attorney General further argued (in his Statement Opposing Jurisdiction) that the construction of the State statute by the highest court of North Carolina precluded this Court from considering the federal questions which are, as the Court below conceded, the only questions involved.

Reduced to its simplest terms, the gist of his argument is that no question is open to review by this Court, because the Court below has decided that the statute here involved does not impose an undue burden upon commerce between the States. If this contention were followed to its logical conclusion, no statute sustained as constitutional by a State court would ever be available for review by this Court.

The question whether a State law or a tax imposed thereunder deprives a party of rights secured by the Federal Constitution depends not upon the form of the act, nor upon how it is construed or characterized by the State court, but upon its practical operation and effect.

American Mfg. Co. v. *St. Louis,* 250 U. S. 459, 462-463.

The Attorney General's argument is succinctly answered in *Wagner* v. *City of Covington,* 251 U. S. 95, at p. 102:

"The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; * * *."

See also:

Macallen Co. v. *Massachusetts*, 279 U. S. 620, 626;
Educational Films Corp. v. *Ward*, 282 U. S. 379, 387;
Lawrence v. *State Tax Comm.*, 286 U. S. 276, 280.

The ruling below that the display of samples in a local hotel room constituted intrastate business in North Carolina does not foreclose this Court from considering and determining for itself whether the appellant's activities in that State actually constituted interstate commerce and whether the State law as applied to the appellant was repugnant to the Commerce Clause.

Kansas City Steel Co. v. *Arkansas*, 269 U. S. 148, 150;
Davis v. *Virginia*, *supra*, at pp. 698-699.

III

The authorities relied upon in the prevailing opinion of the Court below do not support the conclusion there reached and are inapplicable.

Stafford v. *Wallace*, *supra*, *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, and *Welton* v. *Missouri*, *supra*, are cited for a proposition which appellant does not dispute and which is entirely inapplicable to the case at bar, namely: that this Court will not substitute its judgment for legislation enacted by Congress regulating interstate commerce, unless the relation thereto and its effects thereon are clearly non-existent. It is stated *a fortiori* that this Court will presumably not substitute its judgment for that of a State legislature as to its taxing power unless the statute clearly and unduly burdens the freedom of interstate commerce.

That argument is utterly beside the point. Appellant contends that under our theory of government every license and tax statute affecting interstate commerce must be able to pass the test of constitutionality, and the authorities cited do not purport to gainsay that principle.

The difference between the statute in the case at bar and those in the *Stafford* and *Chicago Board of Trade* cases is that in the latter they were scrutinized to determine validity and found not wanting, whereas the statute here involved cannot withstand such scrutiny.

The *Welton* case involved a license statute which was held invalid as infringing the Commerce Clause.

In support of its conclusion that appellant's activity in North Carolina was merely preliminary, incidental, and transpired prior to the interstate movement of goods, the opinion cites the following cases, each of which is readily distinguishable, namely:

Carter v. *Carter Coal Co.*, 298 U. S. 238, is cited for the rule that production has been held not to constitute interstate commerce, which the Court below deems analogous to appellant's activities in North Carolina. That case involved the validity of the Bituminous Coal Conservation Act of 1935, a federal statute. The distinction between production, which was held to be manufacturing and therefore intrastate, and disposal of the manufactured product, which was held to be interstate, is forcibly brought out in the opinion of this Court (at pp. 303-304) as follows:

> "Extraction of coal from the mines is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. *Commerce disposes of it.*" (Italics ours.)

And in the vigorous dissenting opinion by Mr. Justice Cardozo, concurred in by Justices Brandeis and Stone, it is stated that production also constitutes part of inter-

state commerce, and interstate transactions should be considered as a whole and their components should not be broken into separate parts.

Moreover, in the *Labor Board Cases,* 301 U. S. 1, 49 and 58, and in *Edison Co.* v. *Labor Board,* 305 U. S. 197, which were decided subsequent to the *Carter* case, the local production activities of industrial concerns and utilities are held to constitute interstate commerce.

Appellant's activities in North Carolina constituted an integral part of the interstate transaction and were essential to the negotiation and disposal of the merchandise.

Coe v. *Errol,* 116 U. S. 517, and the authorities based thereon, viz., *Kidd* v. *Pearson,* 128 U. S. 1, *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, and *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210, are cited for the rule, undisputed and here inapplicable, that the mere fact that local products are ultimately intended to become subjects of interstate commerce does not suffice to stamp them with immunities attaching to interstate commerce. The basic question in each of the four cases is whether mere intent to export from the State, coupled with partial preparation therefor, exempts the goods on hand in the State from regulation or taxation.

In the *Coe* case such goods on hand on the assessment date are held to be subject to general property taxation, precisely as is other property constituting part of the general mass of property in the State, and that the taxable status continues until, but not after, interstate transportation commences. A different type of tax, but the same principle, is involved in the *Heisler* case. These two cases are cited in *McGoldrick* v. *Berwind-White Co., supra,* (at p. 47) to stand for the proposition that non-discriminatory taxation of property, shipped interstate, before its movement begins, is not a forbidden regulation.

The *Kidd* case involves the exercise by a State of its police power in prohibiting the manufacture of intoxicating liquors within its boundaries, which this Court held

not to be overthrown because the manufacturer intends to export the liquors after their manufacture. The *Champlin Rfg. Co.* case held that the mere intention to export oil produced within a State does not prevent the State from enacting and applying an oil conservation regulation.

The case at bar does not relate to any product of North Carolina intended to be exported therefrom and the challenged tax is not a tax on property.

Chassaniol v. *Greenwood,* 291 U. S. 584, involved the validity of a municipal ordinance imposing an occupation tax on persons engaged in the business of buying and selling cotton for themselves. The City of Greenwood is a concentration point for long staple cotton and an active market for its purchase and sale. Cotton is grown and ginned in Mississippi and sent to Greenwood, where it is compressed and sold through receipts issued by local warehouses. The cotton stopped and came to a complete rest in the City of Greenwood. Chassaniol was engaged in the business of buying and selling cotton for himself; he became the absolute owner and made the profit or bore the loss on the resale. This Court held that as to him the tax was valid and that persons engaged in purely local businesses, such as ginning and warehousing, were properly and lawfully subject to local occupation taxes, just as the property owned by them was subject to general property taxation. The gist of the decision is that an excise for the warehousing of merchandise preparatory to its interstate shipment is not precluded.

Appellant herein is engaged in business and its goods are situated in the City of New York, not in the State of North Carolina. The *Chassaniol* case is authority for the imposition by the City or State of New York of a tax on appellant with respect to its occupation and on its property, prior to its being shipped outside the State of New York. It is not authority for the imposition by the State of North Carolina of a tax on appellant for displaying samples of its goods in order to induce the making of a sale necessarily requiring interstate shipment into North Carolina from New York.

In *Veazie* v. *Moore*, 14 How. 567, the question was whether a law of the State of Maine, granting the exclusive navigation of the Penobscot River which is entirely within the State of Maine from source to mouth, violated the Commerce Clause. It was held that the statute did not in any way relate to interstate or foreign commerce. That case obviously has no bearing.

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250, is relied upon to support the holding that the use of North Carolina real estate for the purpose of displaying samples is only a preliminary activity separate and distinct from interstate commerce, although commercially intended to result in such commerce by stimulating the desire for the goods displayed. The *Western Live Stock* case involved the validity of a New Mexico privilege tax measured by the amount received from the sale of advertising space by persons engaged in the business of publishing newspapers and magazines. The appellant therein published a journal which was wholly prepared, edited and distributed within the State of New Mexico, where its only office and place of business was located. It was contended that the tax was invalid because some of the advertising was obtained through solicitation in other States. This Court held the New Mexico tax valid as an excise conditioned upon the carrying on of a purely local business "separate and distinct from the transportation and intercourse which is interstate commerce." It pointed out that the tax was one which could not be repeated by any other State because the business was not conducted elsewhere than in New Mexico.

The tax there involved was substantially similar to taxes which the appellant is required to pay in its home State of New York, notwithstanding that it engages in interstate business with customers in other States.

The Court below is attempting to reverse the reasoning of the *Western Live Stock* case and thereby to impose cumulative burdens on appellant, which this Court held to be the vice of the forms of taxation uniformly invalidated by it (at pp. 255-256).

Postal Tel.-Cable Co. v. *Richmond*, 249 U. S. 252, is cited for the proposition that even interstate business must pay its way, with which appellant takes no issue. In that case there were imposed on telegraph companies both an annual license tax for the privilege of doing business in the City of Richmond and an annual fee for each telegraph pole maintained or used in the streets of the City. The Telegraph Company actually transacted both intrastate and interstate business, and permanently maintained poles and equipment on the streets. This Court upheld the constitutionality of the statute, and pointed out that the local business purporting to be taxed was so substantial in amount that it did not appear that the tax was an attempt to tax interstate commerce. The evidence established that the poles and wires in the streets required official inspection and supervision, and that the tax was not unreasonable for the municipal service rendered. That case is obviously inapplicable here where only interstate commerce is involved, and it is not, nor can it be, contended that the substantial amount of tax imposed by or under the authority of the challenged statute is merely compensatory.

Coverdale v. *Pipe Line Co.*, 303 U. S. 604, involved the validity of a Louisiana statute imposing a privilege tax on the production of mechanical power as applied to an engine used to supply such power to a compressor, which increased the pressure of natural gas and thus permitted it to be transported to purchasers in other States. The appellee therein was engaged in the business of producing, buying, transporting and selling natural gas in Louisiana, Arkansas and Texas, which gas was obtained from its fields in Louisiana and transmitted through a pipe line to other States. The gas could not be transmitted for the required distance in sufficient amounts except at a pressure higher than that which came from the wells. There were accordingly permanently maintained in Louisiana ten pumps connected with ten large gas-burning engines, as well as two gas-burning engines for general power service in the State.

Louisiana laid a tax on the privilege of operating these twelve gas engines. It was held that the Pipe Line Company was carrying on a local business in maintaining the gas engines, and that it was therefore subject to the privilege tax thereon imposed by the State.

In the *Coverdale* case the tax was imposed for carrying on a purely local business, involving permanent maintenance in the State of very substantial machinery and equipment for the manufacture and production of power. The tax in that case is readily distinguishable from the tax here challenged. The latter is aimed entirely and directly at an integral portion of interstate commerce itself.

None of the foregoing citations is authority for the licensing and taxation by a State of the act of engaging in interstate commerce, or justifies the flagrant discrimination herein sought to be effected. At most, they hold that taxation of a local intrastate business or occupation, which is separate and distinct from the transportation or intercourse which is interstate commerce, is not repugnant to the Commerce Clause merely because interstate transactions are thereby induced or occasioned; and that a State may tax goods which form a part of its general mass of property permanently located within its boundaries even though they may be used in interstate commerce.

Virtually all these precedents were commented on by this Court in *McGoldrick* v. *Berwind-White Co., supra,* which, nevertheless, found them not to be inconsistent with the long line of decisions of this Court following *Robbins* v. *Shelby Taxing District, supra.*

The remaining decisions of this Court cited in the opinion below all relate to use taxes, or to excise taxes for the storage or withdrawal of goods for use by the consignee after the interstate journey has ended. These cases have been fully considered and shown to be inapplicable in Point II, subdiv. 1, at pp. 42-46, *supra.*

IV

The license required and the tax exacted from appellant deny it the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The statute under which the tax was exacted excludes from its operation regular retail merchants in the State of North Carolina. By engaging in the taxed activity, a resident of North Carolina would be a regular retail merchant in the State, and therefore every resident is necessarily exempted.

The purpose of the statute and the actual result of its application are to discriminate against extra-State merchants.[32]

A statutory classification requiring a license and imposing a license tax on extra-State merchants for displaying samples in hotel rooms and houses rented or occupied temporarily for the purpose of securing orders for the retail sale of their goods is so whimsical, arbitrary and capricious as to deny those within such classification the equal protection of the laws, in violation of the Fourteenth Amendment, particularly where, as here, regular retail merchants are not subject to any corresponding regulation or tax.

The law on this subject is summarized in *Colgate* v. *Harvey*, 296 U. S. 404, at pp. 422-423, as follows:

> "It is settled beyond the admissibility of further inquiry that the equal protection clause of the Fourteenth Amendment does not preclude the states from resorting to classification for the purposes of legislation. *Royster Guano Co.* v. *Virginia*, 253 U. S. 412,

[32] This was established in Point I, subdiv. 3, at pp. 27-34, *supra*. See also Yount, "Constitutional Law—Privilege Tax—Temporary Use of Rooms for Solicitation of Sales in Interstate Commerce," 18 North Carolina L. Rev. 48.

415. And 'the power of the state to classify for purposes of taxation is of wide range and flexibility * * *' *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 37. But the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia, supra; Air-Way Corp.* v. *Day,* 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 240. The classification, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones. The test to be applied in such cases as the present one is—does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation? *'Mere* difference is not enough.' *Louisville Gas Co.* v. *Coleman, supra; Frost* v. *Corporation Commission,* 278 U. S. 515, 522."

See also:

Louisville Gas Co. v. *Coleman,* 277 U. S. 32, 38;
Southern Railway Co. v. *Greene,* 216 U. S. 400.

Discriminatory interference with commerce among the States falls within the constitutional prohibition.

"The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application. * * * The act violates the equal protection clause of the Fourteenth Amendment."

Air-Way Corp. v. *Day, supra,* at p. 85.

Appellant recognizes that the Equal Protection Clause of the Fourteenth Amendment does not limit the power of the State to make any reasonable classification of property, occupations, persons or corporations for purposes of taxation; but it submits that it forbids inequality caused by

clearly arbitrary action, especially such as is attributable to hostile discrimination against particular persons or classes.

The statute here challenged, as applied to appellant and other extra-State merchants, clearly falls within such prohibition, because it is arbitrary and discriminates hostilely against extra-State merchants soliciting orders for the sale of goods to be shipped interstate, in favor of regular retail merchants in the State of North Carolina, who are excluded from its provisions and who are not subject to any other license tax whatsoever for the privilege of conducting their businesses.

V

The tax exacted from appellant deprives it of its property without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The statute purports to exercise the taxing authority of the State over property and rights which are wholly beyond the confines of the State and not subject to its jurisdiction.

Appellant's activities constitute solely and exclusively interstate commerce[33] for the exercise of which no privilege has been or may be granted by the State, and the tax is therefore in effect a tax upon the doing of business by appellant without the State, and upon the merchandise of appellant all of which is situate outside the State.

In *Air-Way Corp.* v. *Day, supra,* this Court held (at pp. 81-82):

> "In cases involving the validity of the laws of a State imposing license fees or excise taxes on corporations organized in another State, this Court has decided:
>
> * * * * * *

[33] See Point I, subdivs. 3 and 4, at pp. 27-40, *supra.*

'6. When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the State.' *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 141."

To the same effect see:

Looney v. *Crane Co.,* 245 U. S. 178, 188;
Alpha Cement Co. v. *Massachusetts,* 268 U. S. 203.

The tax exacted from appellant constitutes a taking of its property without due process of law in violation of the Fourteenth Amendment.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of the State of North Carolina should be reversed.

Dated, October 19, 1940.

Respectfully submitted,

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APPENDIX

Statute Involved

The pertinent provisions of Chapter 127 of the State of North Carolina Public Laws of 1937 are as follows:

ARTICLE II.

SCHEDULE B.

LICENSE TAXES.

§ 100. Taxes under this article.—Taxes in this article or schedule shall be imposed as State license tax for the privilege of carrying on the business, exercising the privilege, or doing the act named, and nothing in this article shall be construed to relieve any person, firm, or corporation from the payment of the tax prescribed in this article or schedule.

* * * * * *

(b) Every State license issued under this article or schedule shall be for twelve months, shall expire on the thirty-first day of May of each year, and shall be for the full amount of tax prescribed: Provided, that where the tax is levied on an annual basis and the licensee begins such business or exercises such privilege after the first day of January and prior to the thirty-first day of May of each year, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed and levied upon a gross receipts and/or percentage basis for the conducting of such business or the exercising of such privilege to and including the thirty-first day of May, next following. Every county, city and town license issued under this article or schedule shall be for twelve months, and shall expire on the thirty-first day of May or

thirtieth day of June of each year as the governing body of such county, city or town may determine: Provided, that where the licensee begins such business or exercises such privilege after the expiration of seven months of the current license year of such municipality, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed upon a gross receipts and/or percentage basis.

(c) The State license thus obtained shall be and constitute a personal privilege to conduct the business named in the State license, shall not be transferable to any other person, firm, or corporation, and shall be construed to limit the person, firm, or corporation named in the license to conducting the business and exercising the privilege named in the State license to the county and/or city and location specified in the State license, unless otherwise provided in this article or schedule:

* * * * * *

(e) All State taxes imposed by this article shall be paid to the Commissioner of Revenue, or to one of his deputies; shall be due and payable on or before the first day of June of each year, and after such date shall be deemed delinquent, and subject to all the remedies available and the penalties imposed for the payment of delinquent State license and privilege taxes: Provided, that if a person, firm, or corporation begins any business or the exercise of any privilege requiring a license under this article or schedule after the thirty-first day of May and prior to the thirty-first day of the following May of any year, then such person, firm, or corporation shall apply for and obtain a State license for conducting such business or exercising any such privilege in advance, and before the beginning of such business or the exercise of such privilege; and a failure to so apply and to obtain such State license shall be and constitute a delinquent payment of the State license tax due, and such person, firm, or corporation shall be subject to

the remedies available and penalties imposed for the payment of such delinquent taxes.

[There follows an enumeration of the various businesses, privileges, etc. subject to the imposition of the license tax above referred to.]

§ 121. Peddlers.—(a) Any person, firm, or corporation who or which shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sells or barters the same, shall be deemed a peddler, except such person, firm, or corporation who or which is a wholesale dealer, with an established warehouse in this State and selling only to merchants for resale, and shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business, and shall pay for such license the following tax:

* * * * * * *

(c) Any person, firm, or corporation who or which sells or offers to sell from a cart, wagon, truck, automobile, or other vehicle operated over and upon the streets and/or highways within this State any fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section and shall pay the annual license tax levied in subsection (a) of this Act with reference to the character of the vehicle employed.

* * * * * * *

(d) Every itinerant salesman or merchant who shall expose for sale, either on the street or in a building occupied, in whole or in part, for that purpose, any goods, wares, or merchandise, not being a regular merchant in such county, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of transacting such business, and shall pay for such license a tax of one hundred dollars ($100.00) in each county in which he shall conduct or carry on such business.

* * * * * *

*(e) Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars ($250.00), which license shall entitle such person, firm, or corporation to display such samples, goods, wares, or merchandise in any county in this State.

* * * * * * *

(h) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of the annual license levied by the State. * * *

No county, city, or town shall levy any license tax under this section upon the persons so exempted in this section, nor upon drummers selling by wholesale: * * *

* * * * * * *

§ 181. Unlawful to operate without license.—When a license tax is required by law, and whenever the General Assembly shall levy a license tax on any business, trade, employment, or profession, or for doing any act, it shall be unlawful for any person, firm, or corporation without a license to engage in such business, trade, employment, profession, or do the act; and when such tax is imposed it shall be lawful to grant a license for the business, trade, employment, or for doing the act; and no person, firm, or corporation shall be allowed the privilege of exercising any business, trade, employment, profession, or the doing of any act taxed in this schedule throughout the State under one license, except under a state-wide license.

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* The tax imposed upon applicant was exacted in purported compliance with section 121 (e).

§ 182. Manner of obtaining license from the Commissioner of Revenue.—(a) Every person, firm, or corporation desiring to obtain a State license for the privilege of engaging in any business, trade, employment, profession, or of the doing of any act for which a State license is required shall, unless otherwise provided by law, make application therefor in writing to the Commissioner of Revenue, in which shall be stated the county, city, or town and the definite place therein where the business, trade, employment, or profession is to be exercised; the name and resident address of the applicant, whether the applicant is an individual, firm, or corporation; the nature of the business, trade, employment, or profession; number of years applicant has prosecuted such business, trade, employment, or profession in this State, and such other information as may be required by the Commissioner of Revenue. The application shall be accompanied by the license tax prescribed in this article.

(b) Upon receipt of the application for a State license with the tax prescribed by this article, the Commissioner of Revenue, if satisfied of its correctness, shall issue a State license to the applicant to engage in the business, trade, employment, or profession in the name of and at the place set out in the application. No license issued by the Commissioner of Revenue shall be valid or have any legal effect unless and until the tax prescribed by law has been paid, and the fact of such shall appear on the face of the license.

* * * * * *

§ 186. Property used in a licensed business not exempt from taxation.—A State license, issued under any of the provisions of this article, shall not be construed to exempt from other forms of taxation the property employed in such licensed business, trade, employment, or profession.

§ 187. Engaging in business without a license.—(a) All State license taxes under this article or schedule, unless

otherwise provided for, shall be due and payable annually on or before the first day of June of each year, or at the date of engaging in such business, trade, employment, and/or profession, or doing the act.

(b) If any person, firm, or corporation shall continue the business, trade, employment, or profession, or to do the act, after the expiration of a license previously issued, without obtaining a new license, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, but the fine shall not be less than twenty per cent (20%) of the tax in addition to the tax and the costs; and if such failure to apply for and obtain a new license be continued, such person, firm or corporation shall pay additional tax of five per centum (5%) of the amount of the State license tax which was due and payable on the first day of June of the current year, in addition to the State license tax imposed by this article, for each and every thirty days that such State license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the Commissioner of Revenue and paid with the State license tax, and shall become a part of the State license tax. The penalties for delayed payment hereinbefore provided shall not impair the obligation to procure a license in advance or modify any of the pains and penalties for failure to do so.

The provisions of this section shall apply to taxes levied by the counties of the State under authority of this Act in the same manner and to the same extent as they apply to taxes levied by the State.

(c) If any person, firm, or corporation shall commence to exercise any privilege or to promote any business, trade, employment, or profession, or to do any act requiring a State license under this article without such State license, he or it shall be guilty of a misdemeanor, and shall be fined and/or imprisoned in the discretion of the court; and if such failure, neglect, or refusal to apply for and obtain such

State license be continued, such person, firm, or corporation shall pay an additional tax of five per centum (5%) of the amount of such State license tax which was due and payable at the commencement of the business, trade, employment, or profession, or doing the act, in addition to the State license tax imposed by this article, for each and every thirty (30) days that such State license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the Commissioner of Revenue and paid with the State license tax and shall become a part of the State license tax.

* * * * * * *

§ 189. Duties of Commissioner of Revenue.—(a) Except where otherwise provided, the Commissioner of Revenue shall be the duly authorized agent of this State for the issuing of all State licenses and the collection of all license taxes under this article, and it shall be his duty * * * to ascertain whether all persons, firms, or corporations in the various counties of the State who are taxable under the provisions of this article have applied for the State license and paid the tax thereon levied.

(b) The Commissioner of Revenue shall continually keep in his possession a sufficient supply of blank State license certificates, with corresponding sheets and duplicates consecutively numbered; shall stamp across each State license certificate that is to be good and valid in each and every county of the State the words "State-wide license," and shall stamp or imprint on each and every license certificate the words "issued by the Commissioner of Revenue."

(c) Neither the Commissioner of Revenue nor any of his deputies shall issue any duplicate license unless expressly authorized to do so by a provision of this article or schedule, and unless the original license is lost or has become so mutilated as to be illegible, and in such cases the Commissioner of Revenue is authorized to issue a duplicate certificate for which the tax is paid, and shall stamp upon its face "duplicate".

§ 190. License to be procured before beginning business. —(a) Every person, firm, or corporation engaging in any business, trade, and/or profession, or doing any act for which a State license is required and a tax is to be paid under the provisions of this article or schedule, shall, annually in advance, on or before the first day of June of each year, or before engaging in such business, trade, and/or profession, or doing the act, apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, trade, and/or profession, or doing such act, and shall pay the tax levied therefor.

(b) Licenses shall be kept posted where business is carried on. No person, firm, or corporation shall engage in any business, trade and/or profession, or do the act for which a State license is required in this article or schedule, without having such State license posted conspicuously at the place where such business, trade, and/or profession is carried on; and if the business, trade, and/or profession is such that license cannot be so posted, then the itinerant licensee shall have such license required by this article or schedule in his actual possession at the time of carrying on such business, trade, and/or profession, or doing the act named in this article or schedule, or a duplicate thereof.

(c) Any person, firm, or corporation failing, neglecting, or refusing to have the State license required under this article or schedule posted conspicuously at the place of business for which the license was obtained, or to have the same or a duplicate thereof in actual possession if an itinerant, shall pay an additional tax of twenty-five dollars ($25.00) for each and every separate offense, and each day's failure, neglect, or refusal shall constitute a separate offense.

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